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No. 90-1005

Supreme Court, U.S.
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IN THE

Supreme Court of The United States

October Term, 1990

LLOYD BAKER,

Petitioner,

v.

MECKLENBURG COUNTY, NORTH CAROLINA; GERALD G. FOX, individually and as County Manager; LOUIE J. STRICKLAND, individually and as Personnel Director; and J. HARRY WEATHERLY, JR., individually and as Finance Officer,

Respondents.

BRIEF BY RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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LIST OF PARTIES AND RULE 29.1 LIST

The Petitioner in this case is Lloyd Baker. The Respondents are Mecklenburg County, North Carolina; Gerald G. Fox, individually and as Mecklenburg County Manager; Louie J. Strickland, individually and as Mecklenburg County Personnel Director; and J. Harry Weatherly, Jr., individually and as Finance Officer of Mecklenburg County.

An individual named Nathan E. Alberty was an original defendant. Mr. Baker and Mr. Alberty settled their differences prior to the trial, and Mr. Alberty is not a party to this matter.

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OPINION BELOW

Except for a few insignificant typographical errors, the unpublished opinion of the United States Court of Appeals for the Fourth Circuit dated August 27, 1990, and the September 20, 1990 Amendment to the Unpublished Opinion are set forth accurately at App. 1-23 in the Petition for Writ of Certiorari.

RESPONDENTS' NOTE AS TO DATE OF SERVICE OF PETITION FOR WRIT OF CERTIORARI

The Petition For Writ Of Certiorari was prepared by a printing service and was filed in the Supreme Court on December 21, 1990. On page 24 of the Petition For Writ Of Certiorari (the last page in that booklet), the date of the mailing to the attorney for the Respondents is not stated. The attorney for the Respondents in fact received the Petition on December 26, 1990, although it is possible the Petition would have

been available to the attorney for the Respondents on December 24, 1990, except for the Christmas Eve and Christmas holidays. In any event, to the extent that attorneys for the parties have the authority or ability to do so, the attorney for the Petitioner and the attorney for the Respondents have agreed and stipulated that the Petition For Writ Of Certiorari may be considered as actually having been received by the attorney for the Respondents on December 26, 1990.

STATEMENT OF THE CASE

The complaint in the trial court contained two causes of action. The first cause of action was based upon the theory that Messrs. Fox, Weatherly, and Strickland, in their personal and in their individual capacities, violated Mr. Baker's rights under the First Amendment by

retaliating against him in his public employment because Mr. Baker had gone to the local District Attorney with allegations of financial improprieties concerning Mr. Alberty.

The second cause of action was a pendent state tort claim based upon alleged intentional infliction of emotional distress upon the plaintiff by all of the original defendants in connection with their alleged retaliatory actions with respect to Mr. Baker's employment.

At the close of the plaintiff's evidence, trial counsel for the present Respondents moved for a directed verdict under Fed. R. of Civ. P. 50(a). This motion or these motions and the colloquy between the trial court and Respondents' trial counsel is set forth at pages 507 through 526 of the appendix filed with the Fourth Circuit. The following are excerpts:

> At the close of plaintiff's

evidence, the defendants move for directed verdict pursuant to Rule 50A [sic] on several bases [sic].

. . . .

Yes, move first to dismiss the second cause of action, intentional infliction of emotional distress. The second motion is made on behalf of Mr. Strickland and Mr. Weatherly with respect to the first cause of action, that is, the First Amendment cause of action, because there isn't a shred of evidence that Mr. Strickland ever knew anything about the First Amendment statement and there isn't enough to go to the jury on Mr. Weatherly's alleged knowledge. There is zero.

. . . .

There's no evidence that Mr. Strickland ever knew that Mr. Baker had gone to Mr. Fox in July of 1982, and to the District Attorney in August of 1982, and to Mr. Fox and to Mr. Strickland in the spring of 1983 with the complaints about Mr. Alberty, none, not a shred. You can't retaliate against somebody for doing something that you don't know anything about. If you don't know somebody has experienced a First Amendment right, you can hardly be guilty of retaliating against them for having exercised

> that right . . . . I have just told [the court] the reason for Mr. Strickland, zero knowledge. As to Mr. Weatherly, the only evidence of any knowledge is from two or three of Mr. Baker's witnesses who said that Mr. Fox said at the July 16, 1983 meeting of the Finance Department, Mr. Fox made certain remarks and Mr. Baker got up and said words to the effect, "People are blaming me. I didn't go to the newspapers. I went to the District Attorney." That's literally all Mr. Weatherly can know, taking the plaintiff's evidence at face value . . . . [the motion as to] the second cause of action is to all three [Messrs. Fox, Strickland and Weatherly].[1]

---

1. Pages 58 and 59 of the Appendix in the Fourth Circuit contain stipulations, which were filed with the trial court. The stipulations included the following: "[A]t all times pertinent to this action Messrs. Fox, Strickland, and Weatherly were employees of Mecklenburg County; and all actions taken by these defendants were done under color of State law . . . . [A]ny compensatory liability and compensatory damages issues submitted to the jury under the first cause of action alleged in the complaint with respect to Mr. Fox, to Mr. Strickland, or to Mr. Weatherly will be so submitted without any delineation between personal capacity liability and official

> The first motion is that the second cause of action [intentional infliction of emotional distress] should be dismissed as to everybody, Fox, Strickland and Weatherly. The second motion is that the first cause of action should be dismissed as to Strickland and Weatherly for essentially the same reason unless they knew what Mr. Baker said to the District Attorney and to Mr. Fox. They can't be guilty of retaliating against somebody for saying something when they didn't know anything about it. And then I have a third motion if you are with me so far.
> . . . .
>
> Now, the third motion is on behalf of all defendants, which is upon the basis set out in the supplement to our trial brief and it tersely put is this: If an employee makes a statement which might otherwise be protected by the First Amendment, if that statement is made solely for the purpose of retaining his

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(FN1 continued)
capacity liability, and the answer or answers to any such compensatory liability and compensatory damages issue or issues shall be effective as a jury finding or findings that both personal capacity liability and official capacity liability do or do not exist with regard to such issue or issues." In view of this stipulation, motions on behalf of the individual Respondents necessarily subsumed Mecklenburg County since Mecklenburg County was a party only because of the official capacity allegations against the individual Respondents.

> position and is not made as a citizen would make it, as a matter of public comment, then the statement is not protected.
> . . . .

All motions were denied without prejudice to renew.

This motion at the close of the plaintiff's evidence was for the dismissal of the second cause of action, the state tort of intentional infliction of emotional distress, as to all parties. A similar motion with regard to the pendent state tort claim was made at the close of all of the evidence and was granted by the trial court. Hence, the intentional infliction of emotional distress claim was of no consequence before the Fourth Circuit and is of no consequence now.

At the close of the plaintiff's evidence the clear contention was made that the First Amendment claim should be dismissed as to the

Respondents Strickland and Weatherly because there was not enough evidence to go to the jury upon this claim. Moreover, as shown in the material quoted above, the motions for a directed verdict included a contention "on behalf of all defendants" that the case should be dismissed as to all because the evidence failed to reveal that Mr. Baker's statements were protected by the First Amendment. As stated, all motions for directed verdict made at the close of the plaintiff's evidence were denied without prejudice to renew same.

At the close of all of the evidence, trial counsel for the Respondents made a number of motions for directed verdicts under Rule 50(a). The relevant portions of these motions are contained at pages 730 and 731 of the Appendix before the Fourth Circuit. These motions were as follows:

Now, as to the first cause of action, which is the First Amendment claim, my premise is that you can't retaliate against anybody for exercising the First Amendment rights unless you know they exercised them and there is not one shred of evidence that Joe Strickland ever knew anything that Mr. Baker may have said to Mr. Fox, July '82; to the District Attorney August of '82; to the District Attorney or Mr. Fox in the spring of 1983. Not a shred and it's just a fundamental proposition that you can't do somebody in for something you don't know anything about. So I think that cause of action [First Amendment claim] has to be dismissed as to Mr. Strickland.

The same argument is made on behalf of Mr. Weatherly. Taking the plaintiff's evidence at total face value, giving every doubt in his favor, all Mr. Weatherly ever heard -- all Mr. Weatherly ever knew was in a meeting Mr. Baker says, "I went to the D. A." Now, how, if he doesn't know what Baker allegedly said to the D. A., how can he [Weatherly] retaliate? . . . . So I think that there must be a directed verdict as to Messrs. Strickland and Weatherly as to the first count in the complaint.

> Now, I made a long argument yesterday and I'm not going to wear the Court out again on behalf of all the defendants. You didn't receive that well and I realize I'm not going to get anywhere with that, so I'm going to stop and say he [Mr. Baker] is entitled to go to the jury as to Mr. Fox because he [Mr. Fox] did have information, as to Mr. Fox alone and on the subject of Mr. Fox's recommendation, that Weatherly be named acting finance director -- I think that's confusing -- to the jury only as to that one defendant and only as to that one subject <u>because there is no other evidence that Mr. Fox did anything that adversely affected Mr. Baker's employment</u>. (emphasis supplied)

The only issue as to which this concession was made on behalf of Mr. Fox is the issue relating to the selection of Mr. Weatherly rather than Mr. Baker to be the Acting Director of Finance in June of 1983. This issue and the answer thereto are reproduced at App. 24 and 25 of the Petition For Writ Of Certiorari. This was a $2,000.00 issue and was of minor

importance in the total context of the case.

Except for this one concession, appropriate "insufficiency of the evidence" motions under Rule 50 were made on behalf of all defendants, including Mecklenburg County because of the stipulation quoted in footnote 1.

Despite these motions at the close of the plaintiff's evidence and at the close of all the evidence concerning the insufficiency of the evidence as to all parties, Mr. Baker made no effort to shore up his case even though the trial court explicitly asked whether there was any further evidence to be introduced.

The Respondents' Fed. R. of Civ. P. 50(b) motion for judgment notwithstanding the verdict has been reproduced (with two typographical errors corrected in our quotation at the asterisk marks) in the Petition For Writ Of Certiorari at App. 43-52. The relevant portion

of this motion is as follows:

> 1. At the close of the plaintiff's evidence, the defendants moved for directed verdicts pursuant to Fed. R. of Civ. P. 50(a) upon the basis (1) that the plaintiff's evidence with respect to his second cause of action (the pendent North Carolina tort of intentional infliction of emotional distress) was insufficient to make out a prima facie case, (2) that the plaintiff's evidence with respect to Messrs. Strickland and Weatherly upon the first cause of action (alleged retaliation for exercise of First Amendment rights) was insufficient to go to the jury as *to those defendants because Messrs. Strickland and Weatherly had no knowledge or information with regard to the exercise of the First Amendment rights, and (3) that the *plaintiff's remarks were to further his purely private interest in retaining or maintaining his position with the Finance Department and that the comments were, accordingly, not protected against employer retaliation by any of the defendants. All motions were denied without prejudice.
>
> At the close of all the evidence, the defendants repeated all of

> their motions for directed verdicts. The defendants' motions with regard to the North Carolina tort of intentional infliction of emotional distress were granted. All other motions were denied.
>
> This motion for a judgment notwithstanding the verdict pertains to all issues answered in favor of the plaintiff and is made upon the third proposition mentioned above, i.e., that where the sole purpose of the plaintiff's remarks was to further his purely private interest of retaining or maintaining his own position with the Finance Department, his comments lacked First Amendment Protection against employer reaction. (emphasis supplied)

The motion for a judgment notwithstanding the verdict was denied.

With a few minor, inconsequential typographical errors, the unpublished August 27, 1990 opinion of the United States Court of Appeals for the Fourth Circuit has been reproduced in the Petition For Writ Of Certiorari at App. 1-22. The critical portion

of the appellate opinion is as follows:

> Perhaps the sufficiency of the evidence argument could have been raised more clearly below in the motions for directed verdict and judgment n.o.v. However, we find that the defendants' Rule 50(a) motion for a directed verdict alerted the district court to this issue and that the defendants sought to renew this argument in the motion for judgment n.o.v. The cases cited by Baker in which the court refused to review an issue because it was not presented in a motion for a directed verdict at the close of all the evidence can all be distinguished because, in this case, the court below was adequately informed at the close of all of the evidence of the nature of the defendants' contention that there was a deficiency in the evidence.

Petition For Writ Of Certiorari, App. 8 and 9.

Mr. Baker's petition for rehearing and suggestion for rehearing in banc were denied on September 27, 1990. See Petition For Writ Of Certiorari, App. 41 and 42.

SUMMARY OF REASONS FOR DENYING THE WRIT

The overview propositions set forth below are from 5A, Moore's Federal Practice (2d ed. 1948 & Supp. 1990). Paragraph numbers have been inserted at appropriate places.

A motion for a directed verdict under Rule 50 should state the specific grounds therefor. This requirement, however, is not a technical one; its function is to assure that the trial court has an adequate basis for its decision. So long as the trial court understands the grounds for the motion, the specificity requirement is met. If a defendant moves for a directed verdict at the end of the plaintiff's case and again at the close of all the evidence, both motions can be considered together to determine whether the specificity requirement is

met. The key is whether the trial court understands the grounds for the motion. Id. at ¶50.04.

One of the primary reasons for establishing the motion for a directed verdict as a condition precedent to a motion for judgment n.o.v. is to avoid making a trap of the latter motion. When a motion for directed verdict is made, the party against whom the motion is directed still has the opportunity to cure the defects in proof that might otherwise preclude him from taking the case to the jury. A motion for judgment n.o.v., without prior notice of alleged deficiencies of proof, comes too late for the possibility of cure except by way of a complete new trial. The requirement of the motion for directed verdict is thus in keeping with the spirit of the rules to avoid tactical victories at the expense of substantive interests. Id. at

¶50.08.

In this case, both the trial judge and Mr. Baker's counsel had ample knowledge from the motions for directed verdicts that the defendants were contesting the sufficiency of the evidence as to all issues. Despite this knowledge, Mr. Baker chose to offer no additional evidence after the motions for directed verdict were made at the close of all the evidence. Mr. Baker made no effort to shore up his case even though the trial judge explicitly granted him the authority to do so.

Mr. Baker's position necessarily is that the Fourth Circuit lacked the discretion to accept less than perfect motions for directed verdicts and a less than perfect motion for judgment n.o.v. despite the appellate court's determination that "the court below was adequately informed at the close of all of the

evidence of the nature of the defendants' contention that there was a deficiency in the evidence." Petition For Writ Of Certiorari, App. 8, 9. As we shall see in the next section of this Brief, many Courts Of Appeals have acted in similar fashion. Moreoever, we have found no appellate authority for the proposition that a Court Of Appeals is somehow confined in its appellate review by ambiguous language in a motion for judgment n.o.v., which motion explicitly makes reference to adequate motions for directed verdicts before the trial court.

The trial court and Mr. Baker were in fact adequately informed both at the close of the plaintiff's case and at the close of all the evidence of our contention that there was a deficiency in the evidence.

REASONS FOR DENYING THE WRIT

The cases cited by Mr. Baker in the Petition For Writ Of Certiorari all address the question of whether the specific questions sought to be raised upon appeal were presented to the trial court for determination by it in the first instance. None of these opinions addresses the sufficiency of a n.o.v. motion.

As we have seen from the language of the motions made by the Respondents' trial counsel, the Fourth Circuit in this case quite properly stated that "the court below was adequately informed at the close of all of the evidence of the nature of the defendants' contention that there was a deficiency in the evidence."

It is clear that a federal appellate court may dismiss a judgment below or order judgment n.o.v. where the verdict loser has made an

adequate motion for a directed verdict and has made a n.o.v. motion. Neely v. Martin K. Eby Construction Co., 386 U.S. 317, 87 S.Ct. 1072 (1967). Neely, however, did not purport to address the subject of technical requirements for the n.o.v. motion.

We will mention very briefly cases from several Federal Circuits in which the sufficiency of directed verdict motions at the trial level have been delineated. The cases mentioned below do not constitute an exhaustive itemization but do show that there is really no conflict among the Circuits where factual situations are similar.

The instant case does not represent a new departure by the Fourth Circuit from its established precedent. The underlying philosophy is illustrated by Virginia-Carolina Tie & Wood Co. v. Dunbar, 106 F.2d 383 (4th Cir.

1939). The Fourth Circuit's philosophy as stated in this early opinion is that technical precision is not required in stating the grounds of a Rule 50(a) motion "but merely that [the motion] should be sufficiently stated to apprise the [trial] court fairly as to movant's position with respect thereto." Id., at 385.

Another illustration from the Fourth Circuit is Federal Sav. and Loan Ins. Corp. v. Reeves, 816 F.2d 130 (1987). A plaintiff contended that the defendants failed to preserve a particular issue for appeal by failing to raise that issue in a motion for directed verdict. The Fourth Circuit said:

> However, rigid application of this rule is inappropriate, in a case like this, where such application serves neither of the rule's rationales-protecting the Seventh Amendment right to trial by jury, and ensuring that the opposing party has enough notice of the alleged error to permit an attempt to cure it before resting.

[citation omitted]

> The propriety of implying a civil cause of action from federal criminal statutes would not have been submitted to the jury, even if raised in time to do so. Moreoever, plaintiff had adequate notice of this challenge from defendants' answers to the complaint and amended complaint, and there is no suggestion that plaintiff could have produced any additional evidence that would have been pertinent to this legal issue. We will not be forced to recognize a cause of action because of a procedural error which did not prejudice the plaintiff.

Id. at 138.

The Fourth Circuit standard for review of the sufficiency of the evidence on appeal is not in conflict with other Circuits in similar factual situations.

Cortez v. Life Insurance Company of North America, 408 F.2d 500 (8th Cir. 1969), involved an action by an insurer seeking determination of its liability under an application for a life

insurance policy. The trial court entered a n.o.v. judgment, and the plaintiffs appealed. The appellants contended that the insurance company's motion to dismiss was fatally defective because not in compliance with Rule 50(a). In affirming the decision of the trial court, the Eighth Circuit observed:

> Technical precision is not necessary in stating grounds for the motion so long as the trial court is aware of the movant's position.
> . . . .
>
> In 5 Moore, Federal Practice ¶50.04, at 2338-2339 (2d ed. 1968), it is stated: "A motion for a directed verdict shall state the specific grounds therefor. Failure to state the grounds for the motion with specificity may provide grounds for denying the motion. But the requirement is not a technical one; its function is to assure that the trial court has adequate basis to pass on the motion. Thus, where 'the judge knew what counsel was driving at', or the 'court fully understood' the grounds for the motion, the motion was deemed sufficiently specific.

Defendant's motion at the end of the plaintiff's case will be considered together with his motion after all evidence is in to determine whether the specificity requirement is met. . . . "

Id. at 503 and 504, including footnote 3.

The Third Circuit has responded similarly. In an action brought against the manufacturer of a motorcycle and other defendants related to the motorcycle, the plaintiff received a substantial personal injury verdict. The trial court granted a judgment n.o.v. as to one defendant upon a particular issue, and the Third Circuit reversed the denial of similar motions on behalf of other defendants in Acosta v. Honda Motor Co., 717 F.2d 828 (3rd Cir. 1983).

In Acosta, the plaintiff contended on appeal that the defendants failed to make a sufficiently specific motion for a directed verdict at the close of the evidence. In sustaining the trial court's n.o.v. judgment as

to one defendant and in granting a similar judgment to other defendants, the Third Circuit said:

> Rule 50(b) is essentially a notice provision that, among other functions, protects the important seventh amendment right of trial by jury. A motion for a judgment n.o.v. must be preceded by a motion for a directed verdict sufficiently specific to afford the party against whom the motion is directed an opportunity to cure possible technical defects in proof which might otherwise make his case legally insufficient.
>
> . . . .
>
> We agree with plaintiff's observation that defendants' counsel could (and should) have stated the basis of their motion for a directed verdict with considerably greater specificity. The sole statement made by defendants' counsel in this regard was less than illuminating:
>
> > I move for a directed verdict on Counts 1 and the remaining counts, . . . under 402(1) [sic] theory which is . . . strict liability . . . and the negligence count which I believe are the only

> remaining counts in all of the complaints. . . .
>
> Ordinarily, and standing alone, this motion might not have served as a valid prerequisite to a motion for judgment n.o.v. as to punitive damages. But the communicative content, "specificity" and notice-giving function of an assertion should be judged in context. [citation omitted] In this case, a close examination of the record shows that, despite the imprecision of the sentences uttered by defendants' counsel at the time of his Rule 50(a) motion for a directed verdict, plaintiff's counsel and the court understood and responded to defendants' counsel as well as if he had been more specific at the time.

Id. at 831 and 832.

An individual named Thezan received injuries while serving upon a seagoing vessel. Mr. Thezan was dissatisfied with a jury verdict and filed a n.o.v. motion (among other motions), which was denied by the trial court. On appeal, Mr. Thezan argued that the trial court erred in its failure to grant his n.o.v. motion with

respect to a particular issue. The defendants/appellees contended that Mr. Thezan was precluded from appellate review of the issue because he failed to move for a directed verdict at the conclusion of the case. In Thezan v. Maritime Overseas Corp., 708 F.2d 175 (5th Cir. 1983), cert. denied, 464 U.S. 1050, 104 S. Ct. 729 (1984), the Fifth Circuit said the following:

> The appellees contend that Thezan failed to move for a directed verdict at the conclusion of the case, thus precluding appellate review of this issue. . . . Our review of the record reveals that Thezan did move for a directed verdict at the close of appellee's case, but that his grounds for his motion were less than precise. Rule 50(a) of the Federal Rules of Civil Procedure requires that specific grounds be stated in a motion for a directed verdict. The purpose of this requirement is to apprise the trial court of the movant's position. [citation omitted] Courts have held that technical precision is not necessary in stating grounds for the motion so long as counsel's argument made clear the defenses he

> was relying upon. [citations omitted] While there is no doubt that the appellant's motion could have been more accurately stated, we find that it was sufficient to make the trial court aware of his position, thus preserving the issue for appeal.

Id. at 179, n.2.

A similar Fifth Circuit opinion is Texoma AG-Products v. Hartford Acc. & Indem., 755 F.2d 445 (5th Cir. 1985). Texoma contended that Hartford could not raise a sufficiency of the evidence objection in the appellate court because of Hartford's failure to move for a directed verdict at the close of the evidence. The Fifth Circuit did indeed consider the specific sufficiency of the evidence question because Hartford "did object to the court's charge to the jury on these grounds, and in doing so presented the issues to the district judge and with the effect of a directed verdict

motion." Id. at 448.

As we have stated earlier, there is no conflict among the Circuits in factually similar cases. The Respondents' motions for directed verdicts, taken together, meet the specificity requirement of the relevant rule, as defined by many appellate decisions.

Where, as here, the trial court and Mr. Baker's counsel knew of the Respondents' position concerning the sufficiency of the evidence, and where Mr. Baker's counsel declined an invitation by the court to offer additional evidence, the purpose of Rule 50 has been served.

CONCLUSION

The United States Court Of Appeals for the Fourth Circuit correctly decided this case and correctly concluded from the entire record

before it that the court below (and Mr. Baker's counsel as well) "was adequately informed at the close of all the evidence of the nature of the defendants' contention that there was a deficiency in the evidence." The Respondents, therefore, urge that the Petition For Writ Of Certiorari be denied.

Respectfully submitted,

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January 23, 1991.